IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. _____

RICHARD ADDRISI,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a New York corporation.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No.

RICHARD ADDRISI,

Petitioner,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a New York corporation.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, RICHARD ADDRISI, on behalf of himself and of all others similarly situated, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on

September 30, 1974.

OPINIONS BELOW

Ninth Circuit. The opinion of the United States Court of Appeals for the Ninth Circuit in the case as reported in 503 F.2d 725, appears in Appendix A, infra, pp. 18-28.

District Court. The district court's Order dismissing with prejudice the petitioner's First Amended Class Action Complaint is set forth in Appendix B, infra, pp. 29-31; it was not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit (pp. 20-29, infra) was entered on September 30, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

THE QUESTION PRESENTED

The petitioner brought a federal law suit for damages against the Equitable Life Assurance Society of the United States, claiming that he had been coerced to purchase his insurance policy as a condition to receiving a

home loan from Equitable in violation of the federal antitrust statutes.

The circuit court affirmed the trial court's dismissal of the petitioner's suit on the ground that a policyholder, as distinct from an insurance company or agent, is not protected by federal law from coercive antitrust conduct engaged in by his own insurance company.

The question thereby arising is:

Whether a policyholder of an insurance company has a private cause of action under the antitrust laws of the United States against his own insurance company for damage to his property occasioned by antitrust conduct amounting to per se violations of the Sherman Act, accomplished by means of coercion?

STATUTORY PROVISIONS INVOLVED

The statute which partially exempts the business of insurance from the operation of Federal antitrust laws, 15 U.S.C. Section 1012, reads in pertinent part as follows:

> "(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by and state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. Provided, that after June 30, 1948, the Act. . . known as the Sherman Act, . . . and the Act. . . known as the Clayton Act, . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law." (Emphasis supplied)

The statute which the court of appeals relied on in holding that a policyholder does not have a private right of action against an insurance company guilty of coercive conduct amounting to per se violations of the Sherman Act, [Section 3(b) of the McCarran-Ferguson Act, 59 Stat. 34 (1945)] 15 U. S. C. Section 1013(b), reads in pertinent part as follows:

"(b) nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce. . . or act of boycott, coercion, or intimidation."

The statute which gives a remedy to any person, even a policyholder of an insurance company, who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. 15 U. S. C. Section 15,

reads in pertinent part as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in the district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee . . ." (Emphasis supplied).

THE CONGRESSIONAL INTENT

Emanuel Celler. *The intention of Congressman Emanuel Celler to broaden, not restrict, the applicability of the Sherman Act by the import of his remarks as reported in the Congressional Record, on November 25, 1974 [93rd Congress Second Session, Congressional Record, Vol. 120, No. 1641 appears in Appendix C, infra, pp. 32-36.

* It was the remarks of former Congressman Celler found in 91 Congressional Record, p. 1087, which is cited by the circuit court as a basis for its opinion in this case. (Appendix A, pp. 26-27).

Congress. The legislative history of Section 3(b) of the McCarren-Ferguson Act, 59 Stat. 34 (1945), 15 U. S. C. Section 1013(b), showing that Congress did not intend to restrict the applicability of the Sherman Act to antitrust acts among insurance companies and agents for the purpose of boycott or coercion among insurance companies and agents (the Memorandum prepared by Emanuel Celler referred to in Appendix C, p. 35), also printed in the Congressional Record following the Emanuel Celler letter to George D. Donnahoe dated November 15, 1974, appears in Appendix D, infra, pp. 37-45.

STATEMENT OF FACTS

The facts relevant to the questions presented by this petition are uncontroverted:

The district court dismissed the petitioner's First Amended Class Action Complaint, with prejudice (Appendix B, infra, pp. 29-31). The United States Court of Appeals for the Ninth Circuit affirmed (Appendix A, infra, p. 28). A narrative of the material allegations contained in the petitioner's dismissed pleading is as follows:

ADDRISI seeks a treble damage award from the EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES (Equitable) for violations of Title 15 U. S. C. Sections 14 and 15, commonly known as the

Sherman Act, (antitrust laws of the United States) arising our of Equitable's requirements and practices in its mortgage lending enterprises.

Equitable is a corporation in corporated under the laws of the State of New York, and is authorized to engage in the business of issuing life and other kindred forms of insurance in the State of California, and in the other states of the United States, and has at all pertinent times pursued the practice of making so-called Assured Home Owner Loans, secured by purchase money first deeds of trust or mortgages, to members of the general public for the purpose of financing the purchase of residential real property. In these instances, Equitable's "insurance" agent also acts as Equitable's "loan" agent. As a condition to, and as a "tie-in" with the making of these loans, Equitable requires that the prospective borrower purchase through its joint "insurance-loan agent" a type of cash value life insurance policy known as the "Adjustable Whole Life" policy from Equitable alone, and assign the policy to Equitable as additional collateral.

The Whole Life policy is a high cost policy, and returns high premiums to Equitable and high commissions to their joint loan broker insurance agents. The tie-in requirement of purchasing such a policy from Equitable in order to get the loan is accomplished through the vast economic power of Equitable exerted first through the

representations made by its salesmen-loan brokers to the prospective borrower, and second through the fear of the debtor that failure to pay the monthly insurance premiums alone will result (and on some occasions has) in the loss of his family home.

RICHARD ADDRISI applied for an Equitable loan, and as a result was coerced to purchase the Equitable policy in order to secure his loan, all at a greater expense and cash outlay to him of no less than $864.00 over the cost of the usual type of mortgage insurance policy which he could have purchased on the open market.

The written note secured by the deed of trust executed by ADDRISI not only provided for the repayment of the principal amount of his loan together with the agreed interest, but tied the monthly insurance premium payment in with the monthly payment of the principal and interest. Thus, under the terms of the coerced note and trust deed instruments failure by ADDRISI to pay the monthly insurance premium payments alone would amount to a default subjecting his family home to foreclosure and forfeiture.

THE DISMISSAL OF RICHARD ADDRISI'S CLAIM

The district court granted Equitable's Motion for Dismissal on the basis that the First Amended Class Action Complaint failed to state a claim upon which relief could be granted, and that the Court lacked jurisdiction over the subject matter.

An appeal was taken by the petitioner from the dismissal by the district court, but on September 30, 1974, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court (Appendix A, p. 28).

The court of appeals interpreted 15 U.S.C. 1013(b) as reserving unto the reach of the Sherman Act only a narrow area of restraint of trade activity among those engaged in the business of insurance in interstate commerce, namely, antitrust acts only among insurance companies and agents for the purpose of boycott, coercion, or intimidation only among themselves.

The court of appeals expressed its opinion that including coerced or intimidated policyholders within the class of persons protected from antitrust acts of boycott, coercion or intimidation practiced by insurance companies or agents would violate the McCarran-Ferguson Act in its "concept of turning over unto the several states the

regulation and protection of the insurer-insured relationship."

To that effect, the court of appeals held that the district court was correct in dismissing the petitioner's First Amended Class Action Complaint, with prejudice, because petitioner, ADDRISI, as a "policyholder" (consumer) as distinct from an insurance company or agent, is not protected from "acts of coercion" under the Sherman Act through the reserving thrust of 15 U. S. C. Section 1013(b).

Despite the clear and unambiguous language of the pertinent statutes involved, the court of appeals concluded that the legislative history of 15 U. S. C. Section 1013(b) showed that Congress intended to exclude policyholders at large, as distinct from insurance companies or insurance agents, from even that statute's limited protection for injury to their property sustained as a direct result of coercive or intimidating antitrust conduct practiced against them by their own insurance company!

The court of appeals foreclosed by its opinion the rights of all insurance company policyholders, as a class, to sue for redress in the federal forum for injuries to their property sustained as a direct result of a type of antitrust conduct expressly prohibited by federal law, that is a per se violation of the Sherman Act by an insurance company accomplished by coercion. Thus was your

petitioner's claim dismissed.

REASONS WHY THIS WRIT SHOULD BE GRANTED

The Court of Appeals has decided a question of Federal law of such grave import that the Supreme Court should settle the issue.[1]

Mr. Justice Douglas, dissenting in part, in the Eisen[2] case quoted Judge Weinstein writing in N. Y. Law Journal, May 2, 1972, at page 4:

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(1) The United States Court of Appeals for the Ninth Circuit in two recent decisions, In Re Multidistrict Vehicle Air Pollution M. D. L. No. 31, 481 F. 2d 122 (9th Circuit 1973), and the petitioner's case, slammed the federal door shut first on all overcharged consumers who have not sustained damage to their business or "business property" (as distinct from their "business or property" which is the non-limiting statutory language of 15 U. S. C. Section 15), and now to all policyholders of insurance companies on the ground that they have no "standing to sue" on any basis.

(2) Eisen vs. Carlisle & Jacquelin, __U.S.__ 40 L. Ed. 2d 732 (1974).

"The matter touches on the issue of the creditability of our judicial system. Either we are committed to make reasonable efforts to provide a forum for adjudication of disputes involving all of our citizens--including. . . consumers who overpay for products because of antitrust violations. . .or we are not. There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce while unwilling to grant a civil remedy against a corporation which has benefited by collusive, illegal pricing of its goods to the public.

"When the organization of a modern society, such as ours, affords the possibility of illegal behavior accompanied by widespread, diffuse consequences, some procedural means must exist to remedy--or at least to deter--that conduct." (Emphasis added)

How much more serious it is when the judiciary circumvents clear and unambiguously worded federal statutes in order to deny to the general public not only the procedural means, but the substantive remedy itself.

The Basic Question Presented Has Not Heretofore Been Specifically Determined by This Court.

The basic question in this case would not seem to have ever come before this Court.

Congressional reaction to the Supreme Court's decision in United States v. Southeastern Underwriters Ass'n,(3) which applied federal antitrust laws to the business of insurance, was the passage of the McCarran-Ferguson Act in 1945. Unquestionably the court of appeals was correct when it stated in its opinion that the concept of the McCarran-Ferguson Act was the "setting over unto the several states the regulation and protection of the insurer--insured relationship." However, the scope of the narrow area of anticompetitive trade activity still regulated by federal law pursuant to 15 U.S.C. Section 1013(b) has never been defined by this Court, although it

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(3) 322 U.S. 533 (1944) (Stone, C.J. Frankfurter & Jackson, JJ., dissenting; Read & Roberts JJ., abstaining), which held that the business of insurance was subject to federal regulation under the commerce clause of the United States Constitution.

was conceded in the court of appeals opinion that the antitrust conduct set forth in the petitioner's dismissed pleading would amount to per se violations of the Sherman Act as defined in applicable decisions of the Court.[4]

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(4) Per se violations are those which are "conclusively presumed to be unreasonable and therefore illegal." Northern Pac Ry. v. United States, 356 U.S. 1, 5 (1958). See White Motor Co. v. United States, 372 U.S. 253, 259-60 (1963). Even if one accepts the argument that a "tie-in" sale although coercive in nature is not the type of coercive conduct referred to in 15 U.S.C. Section 1013(b), the coercive conduct complained about by your petitioner in the courts below was the coercive conduct engaged in by his insurance company in order to effect the "tie-in" sale of its expensive insurance policy, both initially, and later from month to month by the odious note and deed of trust provisions.

The question in this case is of special importance because the court of appeals agreed that the antitrust conduct engaged in by the insurance company was sufficient to establish a private cause of action insofar as another insurance company or insurance agent was concerned, but excluded the policyholders themselves from the federal remedy afforded them by our national legislature in clear-cut statutory language.

The narrow construction given to 15 U. S. C. Section 1013(b) by the district court of appeal in its opinion has far reaching and important consequences for the vastly powerful insurance industry, but more importantly effects the economic well being of a vast majority of the citizens of our country. The need and, indeed, almost absolute requirements of modern day life for varied sorts of insurance protection from cradle to grave demonstrates the gravity of denying a private cause of action in the federal forum to the one most gravely affected by an insurance company's anticompetitive conduct--the policyholder himself.

The Important Question Here Has Been Decided Below in a Way Not in Accord with the Social and Economic Public Policies of our Federal Antitrust Legislation, and Circumvents the Legislative Will.

The legislative scheme which mandates a federal remedy for "Any person. . . injured in his. . . property by reason of anything forbidden in the antitrust laws. . .," (5) and

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(5) 15 U. S. C. Section 15.

includes within its statutory ambit those injured by reason of coercive conduct engaged in even by an insurance company--despite a concurrant remedy (or non-remedy) in a non-federal forum[6] ----has been utilized by the court of appeals to deprive the policyholders of insurance companies, as a class, of their rights flowing from statutes designed by their national legislature for their protection.[7]

Thus, the question posed by Mr. Justice Douglas in his partial dissent in Eisen, supra, --do we have a "social system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth" surely should be answered in the affirmative even if only within the narrow federal antitrust question presented by this petition--yet, even within this narrow affirmation of a basic tenet of our law--equal justice for all--the decision of the United States Court of Appeals for the Ninth Circuit is in direct conflict.

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(6) 15 U.S.C. Section 1013(b).

(7) See the legislative history contained in Appendix D, infra, pp. 37-45.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

THE OPINION OF THE UNITED STATES COURT OF APPEALS

OPINION

EAST, Senior District Judge:

The plaintiff-appellant Richard Addrisi (Addrisi), on behalf of himself and all others similarly situated, appeals from the District Court's order dismissing with prejudice his first amended class action complaint on the ground and for the reason that the pleading "fails to state a claim upon which relief can be granted, and that the [District] court lacks jurisdiction over the subject matter." We affirm.

Sufficient for the purposes of the appeal is the following narrative of the allegations contained in the pleading:

Addrisi sought a treble damage award from the defendant-appellee The Equitable Life Assurance Society of the United States

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Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

(Equitable) for alleged violations of Title 15 U.S.C. §§14 and 15, commonly known as the Clayton Act, and §2 of Title 15, commonly known as the Sherman Act, (antitrust laws of the United States) arising our of Equitable's requirements and practices in its insurance-lender enterprises.

Equitable is a corporation incorporated under the laws of the State of New York and authorized to engage in the business of issuing life and other kindred forms of insurance in the State of California, and has at all pertinent times pursued the practice of making so called Assured Home Owner Loans, secured by deeds of trust, to individuals for the purpose of financing the purchase of residential real property sites, specifically offering its Home Owner Loans to prospective policyholders at a lower interest rate than the general prevailing interest rates offered by other institutional lenders in the immediate area. In these instances, Equitable's insurance agent also acts as the loan agent, and as a condition to and a "tie-in" practice with ultimately making these loans, Equitable requires as additional security that the prospective borrower and policyholder purchase through its joint loan broker and insurance agent a type of a "cash value" life insurance policy known as the "Adjustable Whole Life" policy. This policy has a high cost to the policyholder and returns high commissions to the joint loan broker and insurance agent. The tie-in requirement of the purchase of such a policy from Equitable

with the making of the loan is accomplished through the vast economic power of Equitable exerted through the joint loan broker and insurance agent. The agent with human inclinations to either press for or lag with disparaging expressions or statements on the loan application exerts economic coercion upon the prospective borrower to purchase the Equitable policy.

Addrisi applied for an Equitable loan, was subjected to that type of economic coercion, purchased the Equitable policy and secured the loan, all at a greater expense and cash outlay to him of some $864 over the cost of the usual and customary type of term life policy.

It is important to here note that Addrisi's allegations and complaints against Equitable are in sum and substance identical to the allegations contained in the proposed second amended complaint dealt with by the California District Court of Appeals for the Second District in Greenberg v. The Equitable Life Assur. Society of the United States, 34 Cal. App App. 3d 994 (1973), 110 Cal. Rptr. 470. 1/

1/ We are advised that Equitable chose not to petition the Supreme Court of California for a Hearing

ISSUES

We are satisfied that the main meritorious contentions of the parties in this appeal narrow down to presenting three simple issues for our consideration, namely:

(1) Was Equitable engaged in the business of insurance at the time of its alleged conduct?

(2) If so, was its business of insurance regulated by the State of California within the meaning of Title 15 U. S. C. §1012, commonly known as the McCarran-Ferguson Act?

(3) Or was Equitable's alleged acts of economic coercion an "act of . . . coercion, "within the thrust of §1013(b) of Title 15 U. S. C. and thus subject to the proscriptions of the Sherman Act?

DISCUSSION

Issue 1:

Our answer to issue 1 is readily in the affirmative. Addrisi's allegations establish that Equitable is qualified and does actively engage in the business of life insurance within the State of California as well as all other

sister states. While Equitable does also engage in the real estate loan business in California as an adjunct to its business of insurance, Addrisi complains only of the tactics and practices of Equitable in connection with its business of insurance as being proscribed by the antitrust laws of the United States. It is difficult for us to envision a local real estate mortgage loan which, together with real estate loan brokers, 2/ is fully regulated by local state law as being in commerce.

Issue 2:

During the period between the years 1870 and 1944, the Congress and the United States courts adhered to the concept that the business of "[i]ssuing a policy of insurance is not a transaction of commerce." Paul v. Virginia, 75 U.S. (8 Wall) 168, 183. Consequently regulation and policing of the business of insurance was thought to rest exclusively with the states. Then came the decision in United States v. South-Eastern Underwriters Ass'n., 322 U.S. 533 (1944),

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2/ In this connection, see Article 5.5, Insurance Code of the State of California, §§770-776, entitled "Insurance in Connection with Sales and Loans." This section was not dealt with in the companion state case of Greenberg.

holding "that insurance transactions were subject to federal regulation under the Commerce Clause, and that the antitrust laws, in particular, were applicable to them."

> "Congress clearly [became] concerned about the inroads [that] decision might make on the tradition of state regulation of insurance. The McCarran-Ferguson Act was the product of this concern. Its purpose was stated quite clearly in its first section; Congress declared that "the continued regulation and taxation by the several states of the business of insurance is in the public interest.' . . . 15 U.S.C. §1011. As this Court said shortly afterward, '[o]bviously Congress' purposed was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance.'" Prudential Insurance Co. v. Bengamin, 328 U.S. 408, 429, . . .(1946). (Emphasis supplied). S.E.C. v. National Securities, 393 U.S. 453 (1969).

In furtherance of that purpose, §1012 of Title 15, in its pertinent parts, provides:

> "(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. Provided, That after June 30, 1948, the Act. . . known as the Sherman Act, and the Act. . . known as the Clayton Act, . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law." (Emphasis supplied).

National Securities, supra, at page 460, teaches that the relationship between an insurer and its insured, the type of policy which can be issued, its liability, interpretation and enforcement constitute the core of the business of insurance, and that it is clear that the focus of the McCarran-Ferguson Act was on the relationship between an insurance company and its policyholder. "Statutes aimed at protection or regulating this relationship, directly or indirectly, are laws regulating the 'business of insurance.'"

Generally speaking, the State of California has enacted laws extensively "regulating the business of insurance," which have been in effect at all pertinent times, and particularly Article 6.5, Insurance Code of the State of California, §§790-790.10, inclusive, entitled "Unfair Practices." Accordingly we

hold that the State of California regulated Equitable's business of insurance (the relationship between it and its insureds and the ssuance of life policies) within the meaning of §1012(a) and (b); and further, whether the California laws proscribe or permit the alleged acts of economic coercion in the issusance of life insurance policies is of no concern to the full force and effect of §1012(a) and (b). California League of Independent Insurance Producers v. Aetna Casualty & Surety Company, 175 F. Supp. 857 (N. D. Cal. 1959) and Ohio AFL-CIO v. Insurance Rating Board.

Nor are those alternates to our judicial concern, except to note that apparently Addrisi's alleged acts of economic coercion on the part of Equitable are viable claims under California law. Greenberg, supra.

Issue 3:

Addrisi contends that the alleged acts of economic coercion on the part of Equitable remain subject to and are proscribed by the Sherman Act[3/] under the provisions of §1013(b), Title 15, providing:

3/ We assume, without expressing any opinion, that Addrisi's allegations state a viable claim for relief in the antitrust sense under the Sherman Act.

"(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce. . .or act of boycott, coercion, ..." (Emphasis supplied).

Similar contentions as to alleged acts of boycott as used in §1013(b) were heard and rejected in Meicler v. Aetna Casualty and Surety Company, 372 F. Supp. 509 (S. D. Tex. 1974); and Transnational Insurance Company v. Rosenlund, 261 F. Supp. 12 (D. Ore. 1966). We agree with the rationale expressed in each of those cases in that it is evident from an examination of the legislative history behind §1013(b) that the intent of Congress was to reserve unto the reach of the Sherman Act only a narrow area of restraint of trade activity among those in the business of insurance, namely, antitrust acts among insurance companies and agents for the purpose of boycott or coercion among insurance companies and agents. Transnational states: "[t]he legislative history [behind the McCarran-Ferguson Act] shows that the boycott, coercion. . . exception, was placed in the legislation to protect insurance agents from the issuance by insurance companies of a 'black-list,' which would name companies or agents which were beyond the pale. This list, in effect, was a directive to an agent not to write insurance in the name of or for the blacklisted company' otherwise, he would be stripped of his agency and not permitted to write insurance for any of the members of the governing

organization of insurance companies." "1. 91 Congressional Record, p. 1087 (79th Congress, 1st Session)." As so succinctly stated in Meicler, at page 514, so it is here:

> "Neither party has cited nor can this Court locate any decision applying §1013(b) in the context of an alleged combination of insurance companies to boycott, coerce, or intimidate policyholders at large. (Emphasis supplied).

We believe to hold otherwise would vitiate the McCarran-Ferguson Act in its concept of setting over unto the several states the regulation and protection of the insurer-insured relationship. National Securities, supra, at page 460, and Transnational, supra, at page 28.

Whatever meaning or interpretation the California court in Greenberg, supra, may have addressed to the words "acts of coercion" as used in §790.03(c) of the California Insurance Code[4/] can be of no concern here. That California court was in no way dealing

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4/ "'Coercion' prohibited by [§790.03(c)] is thus coercion in the antitrust sense, conduct which constitutes the improper use of economic power to compel another to submit to the wishes of one who wields it. (Atlantic Refining Co. v. Federal Trade

with or attempting to interpret or construe the like language as used in §1013(b). In this appeal, we are not concerned with the meaning or the language of the words "acts of coercion" as used in §1013(b) per se, but only of what class of persons or business relationship is protected from "acts of coercion" under the Sherman Act through the reserving thrust of §1013(b). As pointed out above, neither Greenberg[5/] or Addrisi enjoy that protection.

Finally, we conclude that the District Court was correct in dismissing the first amended class action complaint with prejudice on the ground and for the reason that the pleading fails to state a claim upon which relief can be granted under the antitrust laws of the United States.

AFFIRMED.

(Footnote 4 continued)
Commission, 381 U.S. 357, 368-369, . . . Simpson v. Union Oil Co. of Calif., 377 U.S. 13, 17)" At page 474.

5/ It is manifest that Greenberg inferentially held §1013(b) had no application to the "acts of coercion" alleged, else the state court lacked jurisdiction.

APPENDIX B

THE DISTRICT COURT'S DISMISSAL ORDER

ORDER OF DISMISSAL

The Motion of defendant, THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a corporation (hereinafter called "said defendant), to dismiss the First Amended Class Action Complaint for Treble Damages, for Violation of the Anti-Trust Laws of the United States pursuant to Federal Rules of Civil Procedure, Rules 12(b) (1) and 12 (b) (6), came on regularly for hearing on July 10, 1972, before the Honorable WARREN J. FERGUSON, Judge Presiding, in Courtroom 15, of the above-entitled Court, located at 312 North Spring Street, Los Angeles, California, said matter having been briefed prior to said hearing and plaintiff having been represented at said hearing by Messrs. Toxey Hall Smith and George D. Donnahoe, by George D. Donnahoe, Esq., and said defendant having been represented at said hearing by Messrs. Newlin, Tackabury and Arthur W. Francis, Jr., by George W. Tackabury, Esq., and said matter having been argued, and it appearing to the Court that the plaintiff heretofore on March 7, 1972 filed his Complaint for Damages and a Declaratory Judgment and that Motion to Dismiss said Complaint for Damages and a Declaratory Judgment, and

each cause of action therein contained, having been made by said defendant pursuant to Federal Rules of Civil Procedure (Rules 12 (b) (1) and 12 (b) (6)), and said Motion to Dismiss said Complaint for Damages anda Declaratory Judgment having come on for hearing before the above entitled Court on May 5, 1972, and having been granted pursuant to Order of Dismissal made and filed by the Court herein on May 31, 1972, and plaintiff having been permitted pursuant to said Order of Dismissal dismissing with prejudice said Complaint for Damages and a Declaratory Judgment, and each cause of action therein contained, filed on March 7, 1972, to file an Amended Complaint based explicitly on alleged violation by said defendant of Federal Anti-Trust Laws of the United States, and the Court having found that said First Amended Class Action Complaint for Treble Damages for Violation of the Anti-trust Laws of the United States fails to state a claim upon which relief can be granted, and that the above Court lacks jurisdiction over the subject matter, as set forth in the briefs of said defendant on file herein;

NOW, THEREFORE, IT IS HEREBY ORDERED:

That the Motion of said defendant to Dismiss said First Amended Class Action Complaint for Treble Damages for Violation of the Anti-Trust Laws of the United States, pursuant to Federal Rules of Civil Procedure (Rules 12 (b) (1) and 12 (b) (6)), is hereby granted with prejudice and that the above entitled action be, and the same

hereby is, dismissed with prejudice to plaintiff as against said defendant.

DATED: July 18, 1972.

/s/ Warren J. Ferguson
Judge of the United States
District Court.

APPENDIX C

THE CONGRESSIONAL INTENT

FORMER CONGRESSMAN EMANUEL CELLER

CONGRESSIONAL RECORD
PROCEEDINGS AND DEBATES
OF THE 93d CONGRESS,
SECOND SESSION

Vol. 120 WASHINGTON, MONDAY, No. 164
NOVEMBER 25, 1974

HOUSE OF REPRESENTATIVES

LEGISLATIVE HISTORY
OF MCCARREN-FERGUSON ACT

HON. JAMES C. CORMAN

of California

IN THE HOUSE OF REPRESENTATIVES

Monday, November 25, 1974

"Mr. CORMAN, Mr. Speaker, a letter and memorandum on the legislative history of section 3 (b) of the Mc Carren- Ferguson Act, 59 Stat. 34 (1945). 15 U.S.C. 1013 (b) were brought to my attention. Today, I would like to share them with my colleagues. Their author is the then chairman of the House Judiciary Committee and on of the great legislators of all times, the Honorable Emanuel Cellar.

The articles follow"

Weisman, Celler, Spett,
Modlin & Wertheimer,
New York, N.Y., November 15, 1974

GEORGE D. DONNAHOE, Esq.,
Hollywood, Calif.

DEAR MR. DONNAHOE: This has reference to your letter of October 22, 1974 regarding the opinion of the Ninth Circuit Court of Appeals in ADDRISI v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, No. 72-2607 (slip op., Sep 30 1974). That opinion--relying on MEICLER v. AETNA CASUALTY AND SURETY COMPANY, 327 F. Supp. 509 (S.D. Texas, 1974), and TRANSNATIONAL INSURANCE v. ROSENLUND, 261 F. Supp. 12 (D. Oreg. 1966)--states that it is evident from an examination of the legislative history behind [15 U.S.C.] §1013 (b) [of the McCarren-Ferguson Act][1] "THAT THE INTENT

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1 15 U.S.C. 10 13 (b) provides:
(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate * * *

OF CONGRESS WAS TO RESERVE UNTO THE REACH OF THE SHERMAN ACT ONLY A NARROW AREA OF RESTRAINT OF TRADE AMONG THOSE IN THE BUSINESS OF INSURANCE, NAMELY, ANTITRUST ACTS AMONG INSURANCE COMPANIES AND AGENTS FOR THE PURPOSE OF BOYCOTT OR COERCION AMONG INSURANCE COMPANIES AND AGENTS. [Emphasis Added] Slip. op. at 6-7.

The legislative history [behind the McCarren-Ferguson Act] shows that the boycott, coercion . . . exception, was placed in the legislation to protect insurance agents from the insurance by insurance companies of a "blacklist," which would name companies or agents which were beyond the PALE. This list, in effect, was a directive to an agent not to write insurance in the name of or for the blacklisted company; otherwise, he would be stripped of his agency and not permitted to write insurance for any of the members of the governing organization of insurance companies. 1. 91 Congressional Record, p. 1087 (79th Congress, 1st Session)."

The Congressional Record reference thus cited has to do with remarks I made on the House floor in which I endeavored--successfully--to amend the House version of the McCarren-Ferguson bill to make the Sherman Act applicable not only to any act of boycott, coercion, or intimidation (as provided in the House bill), but also to any agreement to boycott, coerce, or intimidate. My entire purpose in urging this

amendment was thus to BROADEN and not to restrict the applicability of the Sherman Act. By no stretch of the imagination can any remarks be construed as intended to limit the applicability of the Sherman Act to antitrust acts among insurnace companies and agents for the purpose of boycott or coercion among insurance companies and agents. To the contrary, I think it crystal clear, both from my own remarks and from the legislative history of the McCarren-Ferguson Act, that §1013 (b) was intended to render the Sherman Act applicable to (i) ALL agreements to boycott, coerce or intimidate and (ii) to ALL acts of boycott, coercion or intimidation. Indeed, an examination of the entire legislative history of the McCarren-Ferguson Act shows that at no point was there even the most remote suggestion that §1013 (b) was to be limited to the antitrust acts specified by the court in ADDRISSI.

In view of the importance of this matter and since I believe the holding in ADDRISI carves out an exemption from the Sherman Act not intended by the Congress, I have prepared the accompanying memorandum which sets forth in detail the entire legislative history of §1013 (b). This legislative history shows beyond preadventure of doubt that Congress intended in enacting §1013 (b) that the Sherman Act encompass ALL antitrust insurance companies, whether directed against policy holders, insurance agents or others--and not merely antitrust acts among insurance companies and agents for the

purpose of boycott or coercion among insurance companies and agents."

Sincerely yours,

Emanuel Celler.

APPENDIX D

THE CONGRESSIONAL INTENT

CONGRESS ITSELF

CONGRESSIONAL RECORD
PROCEEDINGS AND DEBATES
OF THE 93d CONGRESS,
SECOND SESSION

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HOUSE OF REPRESENTATIVES

"* * * * * *

MOMORANDUM ON LEGISLATIVE HISTORY OF SECTION 3 (b) of the MCCARRAN-FERGUSON ACT

Section 3 (b) of the McCarran-Ferguson Act (15 U.S.C. §1013 (b) provides as follows:

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

This provision had its origin in section 4 (b) of S. 340 which provided (91 Cong. Rec. 478 (1945):

(b) Nothing contained in this section shall render the said Sherman Act inapplicable to any agreement or act of boycott, coercion, or intimidation." [1]

The report of the Senate Judiciary Committee on S. 340 head the following to say regarding this section (S. Rep. No. 20 79th Cong., 1st Sess. (1945), p. 2):

The purpose of the bill is twofold: (1) to declare that the continued regulation and taxation by the several States of business of insurance is in the public interest; and (2) to assure a more adequate regulation of this business in the States by suspending the application of the Sherman and Clayton Acts for approximately two sessions of the State legislatures, so that the States and the Congress may consider legislation during the period. It should be noted that this bill, by the moratoruim purposed therein, does not repeal the Sherman and Clayton Acts, but opportunity will have been granted for the States to permit agreements and contracts by insurance companies which

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1. S. 340 as reported out by the Judiciary Committee was passed by the full Senate without amendment. see 91 Cong. Rec. 488

otherwise might be in violation of the Sherman and Clayton Acts. IT SHOULD BE NOTED FURTHER THAT NO MORATORIUM IS GRANTED FROM THE SHERMAN ACT RELATIVE TO AGREEMENTS OR ACTS OF BOYCOTT, COERCION, OR INTIMIDATION." (Emphasis added.)

In its sectional analysis of the bill, the Senate report stated (id. at 3):

In its sectional analysis of the bill, the "[Section 4] (b) provides that at no time are the prohibitions in the Sherman Act against ANY agreement of act of boycott, coercion, or intimidation suspended. These provisions of the Sherman Act remain in full force and effect." (Emphasis added.)

On the Senate floor it was emphasized in a colloquy between Senators McKellar and Ferguson, the floor manager of the bill, that section 4 (b) applied to ALL agreements or acts of boycott, coercion, or intimidation. To the extent pertinent this colloquy reads as follows (91 Cong. Rec. 478 (1945):

"Mr. Kellar. As I understand the bill its purpose and effect will be to establish the law as it was supposed to be prior to the rendering of the recent opinion of the Supreme Court of the United States. Is that correct?

"Mr. Ferguson. No. I would say that subsection (b) [of section] * * * would allow the provisions of the Sherman Act to apply to ALL agreements or acts of boycott, coercion, or intimidation, ***" (Emphasis added.)

Later in the course of debate, Senator Ferguson made the following additional comments that bear mention (91 Cong. Rec. 480-1):

"[I]f AGREEMENTS IN RESTRAINT OF TRADE OR TO MONOPOLIZE AMOUNTED EITHER TO A BOYCOTT AND/OR COERCION AND/OR INTIMIDATION, THEY WOULD BE ABSOLUTELY VOID, BECAUSE THEY WOULD contradict the bill which is now being considered by the Senate and which it is hoped will be passed today. But certain agreements might be permitted in the States if they did not violate the terms of this bill." (Emphasis added.)

"I think the bill is broad enough to allow a State to pass a law allowing any agreement or contract other than those inhibited in paragraph (b) of section 4. But it is not the purpose of the bill at all to foster monopoly, or anticipate that any act will be passed permitting or even encouraging monopoly. A State law relating to taxation, a law relating to regulation, for instance, the fixing of rates, or the fixing of the terms of a contract of insurance, which might under some definitions of monopoly be monopolistic, would be permitted under the pending bill; BUT IF THE STATE LAW UNDERTOOK TO AUTHORIZE A BOYCOTT, A COERCION, OR AN INTIMIDATION, OR AN AGREEMENT TO DO ANY ONE OF THOSE THREE THINGS, THEN IT WOULD BE CLEARLY VOID because Congress would have already spoken, and once Congress speaks on interstate commerce, no State can speak contrary to the congressional declaration." (Emphasis added.)

After passage by the Senate of S. 340, the bill was referred to the House Judiciary Committee which reported it out favorably with amendments. See H. R. Rep. No. 143, 79th Cong., 1st Sess. (1945). Among such amendments, section 3 (b) of the Senate bill was renumbered section 4 (b) by the Committee and the word "agreement" in section 3 (b) of the Senate bill was deleated. Thus section 4 (b) of the bill, as reported out by the House Committee, read:

"(b) Nothing contained in this section shall render the said Sherman Act inapplicable to any act of boycott, coercion, or intimidation."

With respect to section 4 (b), the House Judiciary Committee report on the bill like the report of the Senate Judiciary Committee -- stated (id. at 3):

"It should be noted further that no moratorium is granted from the Sherman Act relative to agreements or acts of boycott, coercion, or intimidation."

The report further emphasized that section 4(b) --

"provides that at no time are the prohibitions in the Sherman Act against ANY act of boycott, coercion, or intimidation suspended. These provisions of the Sherman Act remain in full force and effect." (Emphasis added.) Id. at 3.

When S. 340, as amended, reached the House floor, an amendment was urged by Representatives

Celler and McCormack to restore the word "agreement" to section 4 (b). Thus Representative Celler stated (91 Cong. Rec. 1087-8):

"Further, there has been left out of this bill that has come out of the Committee on the Judiciary a very important word. That word is "agreement". There is, properly, prescribed in the wording of the pending bill acts "of boycott, coercion, or intimidation." You will find that on page 4, lines 19 and 20 of the bill before you. The Senate version, however, had in addition to "any act of boycott, coercion, or intimidation" the word "agreement" to boycott, coercion, or intimidate.

"What is the danger in leaving that word out? There is a great deal of danger. There great companies can issue a blacklist. It need not be in writing, there need not be a so-called overt act, it could be an oral blacklist, and they would frighten the wits out of all these small companies. In addition there could be an "agreement" for what is known as separation. Let me tell you something about the "separation," if an agent wrote insurance for an outside or marked or proscribed company, or a blacklisted company, he was immediately stripped of his privileges; that is to say, he was not permitted to write insurance for any of the members of the self-constituted governing organizations known as boards. If a member of any of the boards wrote business through that agent which represented independent or nonmember companies, such member company was subject to punishment and was compelled to give up the business.

"That is why I want the word "agreement" put back into the bill. We have no opportunity to amend the bill and to put it back. For that reason, I must perforce oppose the bill, and the Attorney General for that reason is opposed to this bill. "[2].

Thereafter, the following colloquy occurred between Representative Walter, the House floor manager of the bill, and Representative McCormack (id at 1088):

"Mr. Walter, Mr. Speaker, I yield 1 minute to the gentleman from Massachusetts (Mr. McCormack).

"Mr. McCormack, Mr. Speaker, the question raised by the gentleman from New York interests me. Subsection (b) of section 4 on page 4 reads as follows:

"Nothing contained in this section shall render the said Sherman Act inapplicable to any act of boycott, coercion, or intimidation. "

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2. It is evident from these remarks that in an effort to restore the word "agreement" to the bill, Representative Celler was merely setting forth examples of the TYPES of agreements that would be immunized from the Sherman Act unless the word "agreement" was included. At no point in his remarks was there any suggestion that the scope of section 4 (b) should be restricted.

"It has been called to my attention that under that language an act of boycott, coercion, or intimidation will be illegal, but a combination, conspiracy, or compact to coerce, boycott, or intimidate will be free from legal consequences.

"It has been suggested to me by the Attorney General that if the following language is used that would be corrected: "to any agreement to boycott, coerce, or intimidate or act of boycott, coercion, or intimidation."

I would like to ask my friend in charge of the bill if this language is objectionable to him, and if not, when this bill goes to conference, if it does, if the gentleman would agree to accept that language?

"Mr. Walter. Yes."

With this understanding, S. 340, as amended, was passed by the House.

The conference report -- which was passed by the Senate and House, and enacted into law -- adopted the amendment urged by Representatives Celler and McCormack; renumbered section 4 (b) of the bill reported out by the House to section 3 (b); and substituted the word "act" for "section." See 91 Cong. Rec. 1357, 1489. See also 91 Cong. Rec. Appendix A 1190-1. As thus amended, section 3 (b) reads:

"Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate or act of boycott,

coercion, or intimidation."

From the foregoing, it is clear that in enacting section 3 (b) (15 U.S.C. §1013 (b) Congress intended to render the Sherman Act applicable (i) to all agreements to boycott, coercion, or intimidation."